IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-955

W. C. SPOMER, STATES ATTORNEY OF ALEXANDER COUNTY, ILLINOIS, *Petitioner,*

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, BY HIS FATHER AND NEXT FRIEND, HOBERT LAMBERT, MORRIS GARRETT, BY HIS FATHER AND NEXT FRIEND, LEVI GARRETT, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on October 6, 1972.*

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* One of the original parties to this action was Peyton Berbling who was sued individually and as State's Attorney of Alexander County, Illinois. On December 4, 1972, Peyton Berbling was succeeded as State's Attorney by W. C. Spomer. Under Rule 48 (3) of this Court, Mr. Spomer is automatically substituted as a party to the extent the cause affects the State's Attorney of Alexander County.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported. It is printed in the separate Appendix filed on behalf of all petitioners.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 6, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1)

Whether a civil rights complaint can be based upon an alleged denial to private citizens of access to state criminal courts when the state law does not grant to any private citizen the individual right to bring or to prosecute a criminal charge or to testify in any criminal case.

(2)

Whether a district court, through the use of mandatory injunction, may supervise the office of a state prosecutor, requiring him to bring certain charges and regulating the manner in which he prosecutes them.

(3)

Whether the immunity of a prosecutor from suit under the Civil Rights Act prohibits the issuance of a mandatory injunction against him requiring that he prosecute certain cases and do so in a certain manner.

(4)

Whether the complaint was sufficiently specific to state a cause of action against a state prosecutor.

STATEMENT OF THE CASE.

This matter arises from an amended complaint bringing a civil rights class action filed in the United States District Court for the Eastern District of Illinois. Nineteen named plaintiffs, all but two of whom are black citizens of Cairo and Alexander County, Illinois, seek damages and injunctive relief against the State's Attorney of Alexander County, his investigator, and a Magistrate and Associate Circuit Judge of the Circuit Court for Alexander County. The action, premised on 42 U. S. C. Sec. 1981, 1982, 1983 and 1985, sought damages and injunctive relief against the named functionaries of Alexander County for claimed deprivations, under color of law, custom and usage, of various rights and immunities secured to the plaintiffs and their class under the Constitution and the above named sections of Title 42.

During the past few years Cairo, Illinois has been an area of major civil rights activity by the black citizens seeking to alleviate alleged racial discrimination. Part of the civil rights activities involved an economic boycott of local merchants who were alleged to have engaged in racially discriminatory practices. As a result of the economic boycott and general civil rights activities in Cairo the investigative, prosecutorial and judicial officials of Alexander County were required to act. It is on the basis of the resultant actions by the local officials that the specific allegations against the Alexander County functionaries rest.

The State's Attorney is alleged to engage in a pattern of discriminatory conduct in that he refuses to allow blacks to give evidence of crimes committed by white citizens against black citizens of Cairo, refuses to initiate criminal

proceedings against whites who batter blacks, employs the grand jury as a means of delaying and defeating the complaints brought by blacks, purposely prosecutes white offenders inadequately, and discriminatorily makes bond, sentence and charging recommendations.

The named judges of Alexander County are alleged to set bond in criminal cases in a discriminatory manner and sentence black defendants to longer criminal terms and imposes harsher conditions than they do for white persons charged with similar offenses. The district court, after allowing the filing of an amended complaint, entered a Memorandum and Order dismissing the complaints for want of jurisdiction and the immunity of the officials for their judicial and quasi-judicial actions. The district court reasoned that in seeking to enjoin the elected officials of Alexander County for their discretionary acts the plaintiffs attempt to cause the federal court to substitute its judgment for that of the duly elected local officials—an action beyond the jurisdiction of the court. The lower court also held that the doctrine of judicial immunity was applicable to the named judges because the actions alleged in the complaint were taken in the course of the judicial duties. Similarly, the court held that the prosecutor and his investigator were also immune from damage claims arising out of their judicial or quasi-judicial acts.

The Court of Appeals reversed and remanded the case to the district court on the basis that the action was improperly dismissed. The Court of Appeals found that jurisdiction under 42 U. S. C. Sec. 1981 and 1983 did exist and more importantly, the reviewing court considered at length the history, nature, and scope of judicial immunity. The court analyzed the recent decisions on the scope of injunctive relief under Section 1983 and found the "exceptional circumstances" for federal court intervention by injunction of state court criminal prosecutions.

The court then considered the limitations on the concept of prosecutorial immunity and concluded that investigative activities by the prosecutor were not one of the quasi-judicial duties for which he had immunity. Though the court did not hold that the actions of Alexander County State's Attorney complained of in the pleadings were "investigative" in nature, it specifically directed the district court to consider the limitations on the prosecutor's immunity when performing investigative functions. The Court of Appeals concluded by holding that quasi-judicial immunity does not extend complete freedom from injunction to the prosecutor and that the allegations made in the complaint, if established, could merit injunctive relief.

The court, noting that its holding created a case of first impression as to the type of relief approved, volunteered guidelines as to what type of remedy might be imposed, suggesting that periodic reports containing data on bail, sentencing and dispositions of complaints be made by the local officials to the federal district court.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has established a rule which requires the District Court to exercise general supervision over the official acts of state prosecutors. Under this new doctrine the District Court must promulgate rules to govern the institution, prosecution and declination of criminal charges in state court. The prosecutor must file with the Court periodic reports of his conduct. The District Court is empowerd to make judgments upon the correctness of a decision to prosecute or decline in individual cases and upon the vigor and competence of the prosecution in any given case. The District Court can require, under pain of contempt, that the prosecutor bring a particular charge and prosecute it in a manner the District Court regards as sufficiently competent.

This case clearly presents substantial questions of the extent of federal judicial power to require a state prosecutor to require a state prosecutor to institute criminal proceedings and to take certain affirmative actions to secure convictions when such charges are filed. This case also presents important questions of the sufficiency of pleadings and the extent of prosecutorial immunity under the Civil Rights Acts. These issues will be discussed in turn.

A. THE NATURE OF THE CAUSE OF ACTION.

Certiorari Should Be Granted to Determine Whether a Civil Rights Complaint Can Be Based Upon an Alleged Denial to Private Citizens of Access to Criminal Courts in a Jurisdiction in Which No Private Citizen Has an Individual Right to Bring a Criminal Charge or to Testify in Any Criminal Case.

The Court below never offered an adequate account of the basic, individual civil right that was being violated. The complaint designated the applicable right as the "right to give evidence against those who threaten their security, peace and tranquility". The Court referred to the right of "equal access to the criminal justice system."

Under the provisions of Illinois law (which are common to most States) the contentions offered by respondents and the Court are patently invalid. In Illinois, the decision to prosecute lies solely with public prosecuting officers. The decision to bring a criminal case in the name of the People of the State of Illinois is one that can be made only by the duly elected representative of those People. A private citizen has no right to file or prosecute a criminal case. *Hayner* v. *People,* 213 Ill. 142, 72 N. E. 792 (1904). Nor does any citizen have a right to testify in a criminal case. A witness may have a duty to testify when called by the prosecution or the defense but, in the absence of being called by the parties, the witness will have neither the right nor the opportunity to testify.[1] In Illinois a private citizen, regardless of race, creed, politics or wealth, has

1. The distinction between the present case and Lane v. Correll, 434 F. 2d 598, 600 (5th Cir. 1970) is obvious. In *Lane* state law allowed a private citizen to have an arrest warrant issued upon payment of a fee. There the Court held that the refusal to issue a warrant at the request of an indigent citizen was unconstitutional since an acknowledged right was being denied solely because of inability to pay.

no right to bring a criminal case or to testify in a criminal case (unless he is the accused). The private citizen has no right to address either court or grand jury in connection with a criminal prosecution. There is, of course, a right of access to courts by private citizens in Illinois, but that right extends only to filing and prosecution of civil causes. The Illinois law places the exclusive power of criminal prosecution in the public prosecutor as does the federal law. Neither the right relied upon by respondents nor the right envisioned by the Court exist under state or federal law. In the absence of some basic enunciated right, the necessary predicate for a civil rights complaint does not exist.

B. THE REMEDY.

Certiorari Should Be Granted to Consider Whether a District Court May Assume Direct Regulation of the Office of a State Prosecutor.

The Court authorized the use of a mandatory injunction to require a state prosecutor to take certain actions. In this case there was no claim that any prosecutions were unjustifiably commenced. The gravamen of the complaint is directed against the failures of the prosecutor:

(a) to initiate criminal proceedings when the victims are members of the respondents' class;

(b) to proceed on respondents' complaints by complaint and information rather than by grand jury actions;

(c) to interrogate respondents properly before the grand jury;

(d) to prosecute adequately cases involving respondents as complainants.

It is difficult to imagine what kind of specific decree could be entered to assure that these failings be repaired. The Court clearly envisioned a general decree telling the prosecutor to do his job as it is defined by state law. The prosecutor would then be required to report on his actions to the Court on a regular basis. The prosecutor's decisions would be subject to review even in "individual cases". Under threat of contempt, a prosecutor might be compelled to bring certain charges, to present the evidence the Court thinks appropriate and to present it in a manner which meets the approval of the Court. In short, there is nothing even so personal as the prosecutor's tone of voice that is not subjected to direct judicial regulation.[2] That the Court will have to concern itself with individual cases is inevitable. "However strong the tendency may be to secure uniformity, a decision whether to prosecute or not has to be made or the particular facts and circumstances of the particular case." R. Jackson, Enforcing The Law, 53-54 (1967).

From the view of history, the Court's decision is not merely unprecedented, it runs contrary to the well-accepted view of the prosecutor's role in the administration of criminal law.

In 1868, this Court held that the decision as to whether a prosecution is to be instituted is wholly within the discretion of the prosecutor. *Confiscation Cases*, 74 U. S. (7 Wall) 454. Throughout the years, scattered attempts have been made to persuade courts to compel prosecutors to proceed with certain cases. Until the Court below ruled, none of these efforts were successful. See *United States*

2. The prohibitory injunction which has, on rare occasions, been directed against prosecutors differs from the injunction concerned here since it applies relatively objective standards and prohibits specific acts. The remedy here depends upon relatively subjective standards and must necessarily embody vague and uncertain commands.

v. *Cox*, 342 F. 2d 167 (5th Cir. 1965); *Powell* v. *Katzenbach*, 359 F. 2d 234 (D. C. Cir. 1965); *United States* v. *Brokaw*, 60 F. Supp. 100 (S. D. Ill. 1945); *Moses* v. *Kennedy*, 219 F. Supp. 762 (D. D. C. 1963).

The reasons for this refusal of the Courts to compel prosecution are well stated in several cases. "To permit the district court to compel the United States Attorney to proceed . . . would invest prosecutorial power in the judiciary," *United States* v. *Cox*, 342 F. 2d 167, 179 (dissenting opinion). Though the result has been grounded upon the separation of powers, the better view is that the scope of prosecutor's discretion "would have evolved without the doctrine and exists in countries that do not purport to accept the doctrine." *United States* v. *Cox*, 342 F. 2d 167, 193 (Wisdom, J. concurring). The power to decide whether a case will be prosecuted must be lodged somewhere and the prosecutor has been the repository of that power. See *United States* v. *Woody*, 2 F. 2d 262 (D. Mont. 1924); *United States* v. *Cox*, 342 F. 2d 167, 182 (Brown, J. concurring). The Courts have refused to require prosecution for two essential reasons: the lesser is the recognition of the superior expertise of the prosecutor and the greater is the refusal of the judiciary to exercise the powers of the prosecutor as well as those of the court.

The failure of a prosecutor to act when he should is not a matter to be taken lightly. Even so, it is the invariable rule that a "Court cannot compel him to prosecute a complaint or . . . an indictment, whatever his reasons for not acting. The remedy for any derelictions of his duty lies not with the courts but with the executive branch of government and ultimately with the people." *Pugach* v. *Klein*, 193 F. Supp. 630, 635 (S. C. N. Y. 1961).

The Court below exhibited indifference to the established rule and the rationale for it. Apparently the Court believed that whatever considerations dictate the refusal

of a federal court to review a federal prosecutor's decision not to prosecute become somehow irrelevant when the issue before the court concerns a state prosecutor. We do not think that the Civil Rights Acts altered the relationship of the States to the federal government to the extent that the direct federal judicial regulation of state prosecution is permissible. See *Younger* v. *Harris*, 401 U. S. 37 (1971).

The Court's view of the remedy to which respondents would be entitled is ill-considered and extremely unwise. Though this case involves a state prosecutor, the Court could not find any precedent for the issuance of mandatory injunction against a state prosecutor. There is dictum in *Peek* v. *Mitchell*, 419 F. 2d 575, 578-79 (6th Cir. 1970) which would support the view that a failure to prosecute states a cause of action under the Civil Rights Act but *Peek* did not approve the kind of remedy the Court here envisioned. In fact no court has ever entered or contemplated the sort of order approved below. Not one of the law review commentaries cited by the Court below proposed that the courts should compel prosecutorial action by mandamus. The only authority the Court could find to support its action was the proposition that even where a particular remedy is not provided for by statute the court is not barred from fashioning a necessary and appropriate remedy. See *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969); *Jones* v. *Mayer*, 392 U. S. 409, 414 n. 3 (1968).

The fact that a court has the power to fashion a new remedy does not mean that the remedy it does fashion will be effecctive, appropriate or necessary. The Court below, to the extent it considered the issue, ruled in favor of the mandatory injunction because of two assumptions. First, the Court assumed that the alternative remedies were ineffective and, second, the Court assumed that the District

Court could effectively administer the injunctive remedy. Neither assumption is justified.

The alternative remedies against a prosecutor who violates civil rights are effective and far more appropriate than the remedy chosen by the Court below. The prosecutor is subject to criminal prosecution in federal court. The persons whom he declines to prosecute may be similarly liable to federal prosecution. No remedy is more effective since the prosecutor convicted of such is automatically removed from office under Illinois law. See Ill. Rev. Stat. Ch. 38, Sec. 124-2; Ill. Rev. Stat. Ch. 38, Section 1005-5-5 (eff. January 1, 1973); Illinois Constitution, Article XIII, Sec. 1; *People ex rel. Keenen* v. *McGuane,* 13 Ill. 2d 520, 150 N. E. 2d 168 (1958).

The private action for damages against the persons interfering with respondents' rights are also effective remedies. The Court below criticized such a remedy as piecemeal but it seems clear to us that administration of the Court's remedy will be equally piecemeal since the decision to prosecute or to decline must ultimately be reviewed in light of the individual facts of each case. Further both federal criminal prosecution and private damage actions are preferable to a mandatory injunction which requires the District Court to assume the functions of a state prosecutor. The Court below did recognize that there was at least one effective alternative remedy, *i.e.,* dismissal or reduction of charges against members of respondents class so that they will be treated "equally" with other classes. See Comment, 61 Colum. L. Rev. 1103 (1961). The Court held, without reasoning to support its conclusion, that the mandatory injunction was preferable to this alternative. In truth the alternative, draconian as it is, is better than the Courts preferred remedy because it does not require the federal court to assume and exercise *de facto* the powers of the state prosecutor.

Finally, we do not doubt that the proper role of the state prosecutor in our federal system would be better preserved if the scope of his immunity from damage actions were narrowed than it would be if the direct federal judicial supervision envisioned by the Court were allowed.

The District Court is surely not the proper entity to supervise a prosecutor's office. The function of judge is entirely different from that of prosecutor. The competence of a judge to make prosecutorial decisions and direct the use or avoidance of tactics may well be minimal or nonexistent. Entirely apart from the doctrine of separation of powers, courts have generally considered themselves incompetent to make the kinds of decisions that the Court below thinks they ought to make. There is something unseemly even when a judge particularly competent to do so directs a prosecutor to proceed with a certain case in a certain way. Courts should remove themselves from performing such functions. The Court which functions in the role of counsel, especially in the role of public prosecutor, runs a serious risk of losing its neutrality and its appearance of neutrality.

One can easily foresee the intense difficulties a District Court will encounter. The Court may, for example, order a state prosecutor to proceed on given case because its court thinks there is enough to go to a jury. If the same kind of evidence is presented in a federal prosecution, will the court be able to hear the defendant's motion for a directed verdict with a clear, uncommitted mind? If the Court orders a state prosecutor to adopt certain practices to insure that certain cases will be well prosecuted, what posture will the Court take if a convicted state court defendant challenges those practices in a federal habeas corpus proceeding? Will the state court defendant have the right to question sufficiency of evidence in state court when the federal court has already ruled on the issue? Will

the state court defendant be able to argue to the jury that he is being prosecuted by order of the federal court? Will the federal court be able to inquire of grand jurors as to why they refused to indict upon a charge that the federal court has ordered brought? Will the federal court exercise the same control over the state grand jury that it does over the prosecutor? If the prosecutor refuses to obey a court order as to an individual case, accepts a contempt citation and appeals it, will the state statute of limitations be tolled while the appeal is being decided without violating the state court defendant's rights? What remedy will a state court defendant have if he is charged and put to trial and a federal appeals court later decides that the state prosecutor could properly have declined to proceed? Will the potential state court defendant have the right to intervene in the federal proceeding challenging the prosecutor's refusal to prosecute him?[3] Will the federal court have to consider questions of admissibility of confessions, physical and identification evidence in determining whether a given case is a proper one on which to proceed? If the court does so what effect will its rulings have in state trial courts, on state appeal, on federal habeas corpus?

The Court below considered none of these problems (and the list is not exhaustive)—it resolved the question in terms of its faith that the District Court could somehow find its way through to the solution. Such a serious and far-reaching expansion of federal authority over state prosecutors demands some more persuasive rationale than the blind optimism of two circuit judges.

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3. There is something less than fair in respondent's actions here in accusing specific persons of specific crimes and asking, in effect, that prosecution be instituted against them without bothering to give notice to those persons they accuse.

C. THE PROSECUTOR'S IMMUNITY.

Certiorari Should Be Granted to Consider Whether Prosecutorial Immunity Under the Civil Rights Act Prohibits the Issuance of a Mandatory Injunction Requiring the Prosecutor to Prosecute Certain Cases and to Prosecute Them in a Manner the Court Determines to Be Effective.

The Court below rejected the claim that a prosecutor is immune from the kind of relief sought by respondents. The Court's decision must be viewed in light of its extremely grudging attitude toward the question of immunity. Initially, the opinion cited the legislative history that its author thought militated against any grant of immunity. With some regret (and some criticism of precedents on the point) it was conceded that the prosecutor had a certain degree of immunity.[4]

The Court decided that immunity did not extend to mandatory injunctions requiring the prosecutor to institute certain cases and to prosecute them in certain ways. The Court's conclusion (in part inconsistent with its own prior decision in *Arensman* v. *Brown*, 430 F. 2d 190 (7th Cir. 1970)) was based upon two premises.

First, the Court held that the highly discretionary nature of the prosecutor's actions would not require immunity from regulation by mandatory injunction. The Court's reasoning in support of its conclusion is strained. The Court agreed that discretion is involved, but then says that dis-

4. The immunity ruling which favored the prosecutor is not of concern to this petitioner whose sole concern (as the successor prosecutor) is with the mandatory injunction question. Nevertheless it is noteworthy that while the court decided there was some measure of immunity from damages, this immunity only applies to acts within the prosecutor's judicial duties. The Court then remanded to give the respondents a chance to amend their complaint. This disposition was made even though the complaints against the prosecutor largely concerned his conduct in court and before the grand jury which conduct is clearly within his judicial duties.

cretion can be abused and that abuse of discretion is subject to judicial review. It is true that abuse of discretion by a lower court is always subject to appellate review. This does not mean that any state or federal official who exercises discretion is necessarily subject to judicial control. Precedent does not support this claim. *Powell* v. *Katzenbach*, 359 F. 2d 234 (D. C. Cir. 1965).

Second, the Court analyzed the rationale against such injunctions and found them wanting:

> The principal reasons presented for various types of immunity have been capably summarized:
>
> "(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce the honesty and efficiency of public officers." Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1295 n. 54 (1953).
>
> Number (1), (2) and (4) would seem to apply only to civil actions for damages and not to injunctive relief which we have approved herein. Reason number (3) is a serious consideration—a prosecutor's time is necessarily limited—but since we approve not a case a serious consideration—a prosecutor's time is necbrought by a single disappointed complainant, but rather one brought by an entire class of citizens of Cairo, Illinois, the number of such suits charging discrimination against classes of citizens is not predictably substantial nor is their merit predictably insubstantial. Moreover, as to both (3) and (5) the duty owed to the public is primary and that duty is an even-handed, nondiscriminatory enforcement of the laws, not a vin-

> dication of an individual's complaint; it is that public duty which plaintiffs seek to enforce. Finally, as to (6), defendants have not argued, either before this court or in the district court, that there is a requirement of exhaustion of state legal or political remedies, an argument which we would reject in the light of *Carter* v. *Stanton*, 405 U. S. 669 (1972), no matter how potentially adequate those remedies might apear to be.

The Court's analysis is exceptionally shallow. A public official may well be influenced in his official action by a threatened law suit whether or not the suit leads to damages or to a regulatory injunction. Citizens may also be deterred from entering public office. The personal and political consequences of a regulatory injunction are sufficiently harsh to cause a public officer to do what he thinks is wrong rather than suffer a suit for refusing to act. Particularly, the average lawyer would hardly regard the office of prosecutor to be worth the effort and sacrifice it demands if his judgment and competence can be questioned in federal court by any disgruntled group of citizens. The Court of Appeals is apparently of the view that all that affects a public prosecutor or a lawyer deciding whether he will be a prosecutor is the prospect of monetary loss.[5]

Further, the Court's conclusion that these kinds of cases would not be particularly numerous and the merits as not particularly insubstantial flies in the face of the Court's own admission that the case was "of first impression" and the statements of one of the Court's principal authorities that proof of the allegations is very difficult if possible at all. Comment, 61 Colum. L. Rev. 1103 (1961). The Court does not attempt to face the problem of allowing any definable class of citizens to institute suits to force a prosecutor to act in what they believe is the public interest. Identifiable groups of citizens invariably speak for particular

5. There is an irony in this notion since many lawyers who become prosecutors must make a financial sacrifice to do so.

interests and the decrees they seek will not be directed to the general performance of the prosecutor but only to his performance in those cases that interest them. And, once a decree is entered, the court will not be a self-starting supervisor of the prosecutor's conduct. The court will presumably inquire only into those matters that are the source of particular complaints. The duty of the prosecutor is to the public as a whole and not to any individual or class of individuals.

D. THE PLEADING.

Certiorari Should Be Granted to Consider Whether a Conclusory Complaint Drafted by Attorneys Is Sufficient to State a Cause of Action Against a State Prosecutor in Light of the Potential for Abuse Inherent in Such Suits and, the Very Minimal Possibility of the Plaintiffs Prevailing.

The respondents brought a class action. They sought a federal court order requiring the county prosecutor to proceed with certain cases which he had declined to prosecute and to prosecute effectively certain cases on which he had elected to proceed. The potential scope of suits like these is awesome. Class actions may be filed by innumerable civic groups seeking to compel vigorous prosecution of certain classes of offenses which they claim are being inadequately pursued by a local prosecutor acting out of improper motives. Those who oppose abortion or pornography could file such suits where the prosecutor fails to act vigorously enough to please them. The criminal laws affecting landlords and their tenants may not be enforced consistently enough or well enough to suit either group and both may bring their complaints to a federal court and ask it to regulate state prosecution. Environmentalists and the industrialists they oppose will want to litigate prosecution

policy in a similar fashion. The list of real or imagined grievances that a class of citizens may have against a local prosecutor for failure to bring certain charges or to prosecute them adequately is endless. And it is never difficult to allege that the prosecutor's motives are based upon racial, religious or political prejudice.[6]

The fact that a particular form of action may be abused does not necessarily mean that the courts must refuse to allow its use. However the potential for abuse does have bearing upon the stringency of the requirements a court should adopt before allowing the form of action to be invoked.

The question of abuse can not be measured solely in terms of the number of suits that may be brought under a particular rubric. It is also important to determine the probability of the plaintiffs prevailing in such cases. If it is highly improbable that they will do so, the initial threshold which plaintiffs must reach in order to state a cause should be high.

A permissive pleading policy for causes which are almost certain to fail on their merits does nothing to protect the rights of potential plaintiffs, it only opens wide the door to the use of courts to harass potential defendants. The Court below recognized the problems of proof but suggested that proof might be made in the ways suggested in Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103, 1122-31 (1961). Yet in this case, the complaint alleges that some of the charges the respondents want prosecuted have been brought. Under

6. A permissive attitude toward development of suits like these will inevitably embroil the District Court in local political disputes to a degree we think in unacceptable. It would not be difficult for the supporters of a challenger for the prosecutor's office to file an adequate complaint and use the litigation process to harass and attack the incumbent. Each ruling of the District Court for either side during the campaign would assume substantial political significance.

these circumstances, i.e., bringing some of the desired charges, the article cited by the Court suggests that proof of the merits is nearly impossible. 61 Colum. L. Rev. at 1129.

The pleading here was drafted by lawyers, not uninformed laymen. Every essential allegation is conclusory in nature. The allegations could be made against any prosecutor and, if such allegations are sufficient, the prosecutor would be required to answer the complaint, to submit to extensive discovery and to consume more of the already overtaxed resources of his office in defending the suit. In order to remedy what the respondents' lawyers must have recognized was a clearly inadequate pleading, the complaint was fortified with specific factual examples. These examples involved accusations of crime made by what appear to be single witnesses. In one case the alleged criminal was not identified. In another case, the accusation was not brought to the attention of the prosecutor. There were no examples pleaded which showed that the prosecutor was willing to bring charges against other persons upon the same quantity of evidence present in the illustrative cases. In the stated examples there was no effort to show that the evidence available was of the quality necessary to secure conviction. Further, there were no factual allegations to support the claims that there is inadequate prosecution, that greater bonds are required and higher charges brought when members of plaintiffs' class are accused.

It is submitted that at the very minimum the Court below should have required a more rigorous pleading than the one it approved here.[7] If no more is required than is found here, then "every complaint against a State official by the simple expedient of averring conclusions would be cognizable in the federal courts under the Civil Rights Act."

7. A similarly conclusory petition was held insufficient to justify federal action under another provision of the Civil Rights Act. See Greenwood v. Peacock, 384 U. S. 808 (1966).

United States ex rel. Hoge v. *Bolsinger*, 211 F. Supp. 199, 201 (W. D. Pa. 1962), aff'd 371 F. 2d 215 (3rd Cir. 1962), cert. denied 372 U. S. 931 (1913).

CONCLUSION.

For the reasons given above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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